



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095

(603) 271-3503 FAX (603) 271-2867



CCE #1, L.L.C.
PO Box 94
Holts Point Road
Hampstead, NH 03841

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 01-081**

July 31, 2001

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("the Division") to CCE#1, L.L.C., pursuant to RSA 482-A:13 and Env-C 614. The Division is proposing that fines totaling \$7,000 be imposed against CCE#1, L.L.C. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. Parties

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. CCE#1, L.L.C. ("CCE#1") is a New Hampshire Limited Liability Company having a mailing address of PO Box 94, Hampstead, NH 03841.

III. Summary of Facts and Law Supporting Claims

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in surface waters of the state, shorelines of surface waters, and in wetlands. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, the Commissioner of DES has adopted Env-Ws 415 to implement this program.
4. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of, *inter alia*, RSA 485-A:17, Env-Ws 415, or any permit issued pursuant thereto. Pursuant to RSA 485-A:22, V, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.

5. RSA 482-A:3, I states in part that no person shall “excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES].”

6. RSA 482-A:12 states in part that “[p]roject approval by [DES] shall be in the form of a permit, a copy of which the applicant shall post in a secured manner in a prominent place at the site of the approved project.”

7. Env-Ws 1703.03(c) defines general water quality criteria, in part, as: “(1) All surface waters shall be free from substances in kind or quality which: (a) settle to form harmful deposits; ... (c) produce odor, color, taste or turbidity which is not naturally occurring and would render it unsuitable for its designated uses....”

8. Env-Ws 415.02(y) defines “to significantly alter the characteristics of the terrain” as “to undertake any activity anywhere in the state that changes or disturbs the terrain so as to impede the natural runoff or create an unnatural runoff that has the potential to adversely affect water quality in the state’s surface waters. Examples of activities which significantly alter the characteristics of the terrain include, but are not limited to earth moving activities which result in a disturbance of more than 100,000 square feet of contiguous area....”

9. On September 22, 1999, CCE #1 was issued permit number 1999-01333 (“the Permit”) pursuant to RSA 482-A for work associated with the development of a seven-lot subdivision in the Town of Hampstead, identified on Town of Hampstead Tax Map 6 as Lot 54 (“the Property”).

10. The Permit was issued for the stated purpose to “[d]redge and fill 18,830 sq. ft. of forested wetland for a 7 lot commercial subdivision with two wetlands crossings, 2,340 sq. ft. and 16,490 sq. ft. in accordance with plans received on July 12, 1999.”

11. The Permit included the following Specific and General Conditions: “4. Orange construction fencing shall be placed at the limits of construction; siltation/erosion controls shall be installed prior to construction, shall be maintained during construction, and shall remain until the area is stabilized.” The Permit also included the following General Condition: “1. A copy of this permit shall be posted on site during construction in a prominent location visible to inspecting personnel.”

12. On July 17, 2000 Division personnel inspected the Property. Following the inspection, the Division issued a Letter of Deficiency WD WQE 00-14 (“the LOD”) to CCE #1. The following three deficiencies were documented at that time:

- a. An area in excess of 100,000 square feet had been disturbed without first obtaining a permit from DES as required by RSA 485-A:17.
- b. Silt fences and hay bales had failed to prevent sediment from entering Wetland Impact Areas #1 and #2 at the culvert crossings of the road construction.
- c. The large cleared area had not been stabilized as required by condition #4 of the Permit

13. The sediment entering Wetland Impact Areas #1 and #2 violated Env-Ws 1703.03(c)(1)(a) and (c)(1)(c).
14. The LOD requested to CCE#1 to submit a site specific permit application by September 15, 2000 and to correct the stabilization deficiencies within 10 days of receipt of the LOD.
15. On August 31, 2000, Division personnel re-inspected the Property. During the August inspection, the following deficiencies were documented:
 - a. No orange construction fencing was observed on the project.
 - b. Two culverts were observed under Gigante Drive. Water flowed through the culverts from two separate wetlands. One wetland is located on a parcel identified 6-54-1 on the July 12, 1999 plans referenced in the Permit ("Wetland #1"). The other wetland straddles lot 6-54-1 and Parcel A as shown on the July 12, 1999 plans ("Wetland #2"). These are the same culverts referenced in the LOD. Wetland #1 had evidence of rutting caused by the weight of vehicles traveling through it, resulting in less than 3,000 square feet of impact to the wetland without a permit from DES. Vehicles would have been unable to access Wetland #1 had orange construction fencing been placed at the limits of construction as required by the Permit.
 - c. Siltation and erosion control measures had not been properly maintained around the outlet of the culvert leading from Wetland #1 and sediment had not been removed as requested in the LOD. Significant sedimentation was observed in Wetland #1 from road construction activities.
 - d. Siltation and erosion control measures had not been properly maintained around Wetland #2 and at the outlet of the culvert leading from Wetland #2 and sediment had not been removed as requested in the LOD. As a result, significant sedimentation was observed in Wetland #2 from road construction activities.
 - e. A copy of the Permit was not posted as required by General Condition #1 of the Permit and by RSA 482-A:12.
16. DES has no record of receiving an application from CCE#1 for a site specific permit.
17. Env-C 614.02(a)(1) defines a Class I Violation in part as "(a) [u]nauthorized dredge, removal, or excavation that involves: (1) [a] total impact of 3,000 square feet or less in a non-tidal swamp or wet meadow that does not involve draining of wetland for lot development, with disturbance to no more than 5 percent of the area of impacted wetlands."
18. Env-C 614.05(l) defines a Class IV Violation in part as "[f]ailing to install, use, or maintain appropriate siltation or erosion control devices, turbidity curtains, or booms for any construction project located in wetlands jurisdiction, resulting in water quality violations."
19. Env-C 614.05(m) defines a Class IV Violation in part as "[f]ailing to comply with notification, filing, or other specific permit conditions that do not fall into any of the above-listed

criteria.”

20. Env-C 614.02 authorizes a fine of \$500 for Class I Violations.

21. Env-C 614.05 authorizes a fine of \$2,000 for Class IV Violations.

22. Env-C 614.07(a) authorizes a fine of \$500 for “[f]ailing to post a permit as specified by RSA 482-A:12.”

23. Env-C 603.02(a) authorizes a fine of \$2,000 “for construction, earth moving or other activities resulting in the significant alteration of 100,000 sq. ft. or greater of the terrain without a permit, if ... (2) the activities have caused a water quality violation,....”

IV. Violations Alleged

1. CCE #1, LLC has violated the Permit by failing to maintain appropriate siltation and erosion controls in or adjacent to waters of the state as required by Permit Condition #4 resulting in a violation of general water quality criteria as defined by Env-Ws 1703.03(c).
2. CCE #1, LLC has violated the Permit by failing to maintain orange construction fencing around the limits of construction as required by Permit Condition #4.
3. CCE #1, LLC has violated RSA 482-A:3, I and RSA 482-A:14, III by causing less than 3,000 square feet of rutting within a wetland without a permit from DES.
4. CCE #1, LLC has violated RSA 482-A:12 by failing to post the Permit.
5. CCE #1, LLC has violated RSA 485-A:17 by significantly altering the characteristics of the terrain without a permit from DES resulting in a violation of general water quality criteria as defined by Env-Ws 1703.03(c).

V. Proposed Administrative Fines

- 1 For the violation identified in IV.1 above, Env-C 614.05(l) specifies a fine of \$2,000.
2. For the violation identified in IV.2 above, Env-C 614.05(m) specifies a fine of \$2,000
- 3 For the violation identified in IV.3 above, Env-C 614.02(a)(1) specifies a fine of \$500.
- 4 For the violation identified in IV.4 above, Env-C 614.07(a) specifies a fine of \$500
5. For the violation identified in IV.5 above, Env-C 603.02(a)(2) specifies a fine of \$2,000.

The total fine being sought is \$7,000.

VI. Hearing, Required Response

You have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, October 1, 2001 at 9 a.m.** in **Room C-110** of the DES offices at **6 Hazen Drive** in Concord, NH. **Pursuant to Env-C 601.06, you are required to respond to this notice.** Please respond **no later than August 31, 2001**, using the enclosed colored form as follows:

1. If CCE#1 plans to attend the hearing, please have an authorized representative sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form.

2. If CCE#1 chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.

3. If CCE#1 wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to Mr. Ballentine **and** call Mr. Ballentine to indicate CCE#1's interest in settling.

CCE#1 is not required to be represented by an attorney. If CCE#1 chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If CCE#1 wishes to have a hearing but is unable to attend as scheduled, CCE#1 must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If CCE#1 fails to notify Mr. Ballentine in advance and does not have a representative attend the hearing, the hearing will be conducted in CCE#1's absence in accordance with Env-C 204.09.

VII. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that CCE#1 committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that CCE#1 committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that CCE#1 proves, by a preponderance of the evidence, applies in this case:**

- 1 The violation was a one-time or non-continuing violation, **and** CCE#1 did not

know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** CCE#1 did not benefit financially, whether directly or indirectly, from the violation.

- 2 At the time the violation was committed, CCE#1 was making a good faith effort to comply with the requirement that was violated.
- 3 CCE#1 has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
- 4 Other information exists which is favorable to CCE#1's case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that CCE#1 committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is CCE#1's opportunity to present testimony and evidence that CCE#1 did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If CCE#1 has any evidence, such as photographs, business records or other documents, that CCE#1 believes show that CCE#1 did not commit the violation(s) or that otherwise support CCE#1's position, CCE#1 should bring the evidence to the hearing. CCE#1 may also bring witnesses (other people) to the hearing to testify on CCE#1's behalf.

If CCE#1 wishes to have an informal meeting to discuss the issues, CCE#1 must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If CCE#1 has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

COPY

for Harry T. Stewart, P.E., Director
Water Division

Enclosure (*NHDES Fact Sheet #CO-2000*)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Rules & Hearings Attorney
Hampstead Conservation Commission
Hampstead Board of Selectmen
Harry T. Stewart, P.E., Director
Marjory Swope, NHACC
Michael Walls, DOJ/EPB
Richard W. Head, DES (File #99-1333)